

Testimony of Linda J. Morgan  
Chairman of the Surface Transportation Board

Senate Committee on Commerce, Science, and Transportation  
Hearing on  
March 17, 2000 Decision Issued by  
the Surface Transportation Board

March 23, 2000

My name is Linda J. Morgan, Chairman of the Surface Transportation Board (Board). I am appearing at the request of the Subcommittee to discuss the decision served by the Board on March 17, 2000, in STB Ex Parte No. 582, Public Views on Major Rail Consolidations. For the record, I am including a copy of the Board's decision with my written statement.

Background

The Board's proceeding in STB Ex Parte No. 582 was triggered by the filing of a notice on December 20, 1999, that the Burlington Northern and Santa Fe Railway (BNSF) and Canadian National (CN) intended to file an application, on or shortly after March 20, 2000, seeking Board approval to bring their railroad systems under common control. Given the aggressive consolidation and associated disruptions that had occurred in the railroad industry during the past several years, and the likelihood that the BNSF/CN proposal would set off yet another full round of major rail consolidations, the Board issued an order on December 28, 1999, waiving the so-called *Aone* case at a time@rule for the BNSF/CN proceeding and stating that, if the BNSF/CN proceeding went forward, the Board would consider not only the direct impacts of that combination, but also evidence of the cumulative impacts and crossover effects that would likely occur as other railroads developed strategic responses in reaction to the proposed combined new system. In addition, given the prospect of significant further consolidation within the railroad industry, and the Board's concern that the railroad industry and the shipping public have not yet recovered from the service disruptions associated with the previous round of mergers, the Board issued an order on January 24, 2000, opening the STB Ex Parte No. 582

proceeding to obtain public views on the subject of major rail consolidations and the present and future structure of the North American rail industry.

### The March 17 Decision

As part of the STB Ex Parte No. 582 proceeding, the Board took written and oral testimony from all sectors associated with the rail industry, including large and small rail carriers; large and small shippers representing various commodity groups; intermodal and third party transportation providers; rail employees; state and local interests; financial analysts and economists; and Members of Congress (including Members of this Committee) and other federal agencies. The overwhelming weight of the testimony, particularly the testimony taken over the 4 days of oral hearings, was that, at a minimum, the Board's merger policy must be reexamined --and must be reexamined now -- before any new major mergers are processed. The Board agreed, concluding in its March 17 decision that the rail community is not in a position to now undertake what will likely be the final round of restructuring of the North American railroad industry, and that current Board rules are not appropriate for addressing the broad concerns associated with reviewing transactions that may well produce two transcontinental railroads.

In reaching the March 17 decision, the Board recognized that the Government is not in the business of drawing railroad maps, and that this agency is not attempting to do so in this proceeding. The Board also recognized that the law it administers generally contemplates private initiatives that are then subjected to regulatory scrutiny. But the Board is required to take actions and to fashion regulations that advance its mandate -- under which it is to approve mergers only to the extent consistent with the public interest, and under which it is to promote a safe and sound rail system that runs smoothly and efficiently to provide service for rail customers -- in a manner that is consistent with the overall rail transportation policy established by Congress. The Board found that it would be impracticable to try to act on a final round of mergers while in the process of developing new merger rules, and that such an approach would also be disruptive to the rail system and to rail service that remains well below acceptable levels in many areas. The disruption would go far beyond the specific interests of BNSF and CN and the carriers that compete with them; it could irreparably damage the

entire industry, to the detriment of the interests of shippers, rail employees, and the national economy and defense.

Thus, in the March 17 decision, the Board announced that, over the next 15 months, it would initiate and complete a proceeding that will provide new merger rules. To permit the development of the new rules, and to ensure that the industry has had the opportunity to fully recover from service problems associated with recent mergers without the distractions associated with consideration of additional mergers, the Board decided that it could best maintain the status quo by ordering a suspension of all merger activity, categorized as major rail transactions, until after the final merger rules are issued, or a total period of 15 months.

#### Activity Stemming From the March 17 Decision

The Board is currently preparing an advance notice of proposed rulemaking (ANPR) to institute the process of reexamining its merger rules and policy. The Board expects to issue the ANPR to the public by April 6, 2000 (within 20 days of the March 17 decision).

BNSF, CN and the Western Coal Traffic League have appealed the Board's March 17 decision to the Court of Appeals for the District of Columbia Circuit. Also, BNSF has filed with the Board a petition for an administrative stay pending judicial review of the Board's decision.

This concludes my testimony. As I stated earlier, I am including a copy of the Board's March 17 decision, which fully explains the action taken by the Board. I will try to answer any questions that you may have regarding the March 17 decision, given the constraints that the pending agency and court proceedings impose on me at this time.

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SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

Decided: March 16, 2000

OVERVIEW

This proceeding was triggered by a notice filed on December 20, 1999, indicating that another major railroad merger application was imminent.<sup>1</sup> The railroad industry has consolidated aggressively in recent years; now that Consolidated Rail Corporation (Conrail) has been divided between CSX and NS, only six large railroads remain in the United States and Canada.<sup>2</sup> In an order issued on December 28, 1999,<sup>3</sup> we stated that, if the BNSF/CN proceeding went forward, we would consider not only the

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<sup>1</sup> In particular, The Burlington Northern and Santa Fe Railway Company and Canadian National Railway Company filed a notice of intent to file, on approximately March 20, 2000, an application seeking Board authorization under 49 U.S.C. 11323-25 and 49 CFR part 1180 for a major transaction (referred to as the BNSF/CN transaction) under which the two railroads would be brought under common control.

<sup>2</sup> The six are: The Burlington Northern and Santa Fe Railway Company (BNSF); Union Pacific Railroad Company (UP); CSX Transportation, Inc. (CSX); Norfolk Southern Railway Company (NS); Canadian National Railway Company (CN); and Canadian Pacific Railway Company (CP). Two smaller U.S. Class I railroads (Grand Trunk Western Railroad Incorporated and Illinois Central Railroad Company (IC)) are affiliated with CN. A third smaller U.S. Class I railroad (Soo Line Railroad Company) is affiliated with CP. A fourth smaller U.S. Class I railroad (The Kansas City Southern Railway Company (KCS)) remains independent but has entered into a comprehensive alliance with CN and IC.

<sup>3</sup> Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company C Common Control, STB Finance Docket No. 33842, Decision Nos. 1 & 1A (STB served Dec. 28, 1999) (published in the Federal Register on Jan. 4, 2000, at 65 FR 318).

direct impacts of that combination, but also evidence of the cumulative impacts and crossover effects that would likely occur as other railroads developed strategic responses in reaction to the proposed combined new system. Additionally, given the prospect of significant further consolidation within the railroad industry, and our concern that the railroad industry and the shipping public have not yet recovered from the service disruptions associated with the previous round of mergers, we opened this proceeding to obtain public views on the subject of major rail consolidations and the present and future structure of the North American rail industry.

As part of this proceeding, we took written and oral testimony from all sectors associated with the rail industry: large and small rail carriers; large and small shippers representing various commodity groups; intermodal and third party transportation providers; rail employees; state and local interests; financial analysts and economists; and Members of Congress and other federal agencies. Certain parties expressed support for a radical overhaul of the entire regulatory scheme; some parties expressed support for a business-as-usual approach to rail regulation in general and rail mergers in particular; still others took the view that no more rail mergers should be permitted under any circumstances. But the overwhelming weight of the testimony, particularly the oral testimony, was that, at a minimum, our merger policy must be reexamined and must be reexamined now before any new major mergers are processed. Because we conclude that the rail community is not in a position to now undertake what will likely be the final round of restructuring of the North American railroad industry, and because our current rules are simply not appropriate for addressing the broad concerns associated with reviewing business deals geared to produce two transcontinental railroads, we agree.

We recognize that the Government is not in the business of drawing railroad maps, and we are not attempting to do so in this proceeding. We are also aware that the law that we administer generally contemplates private initiatives that are then subjected to regulatory scrutiny. But we are required to take actions and to fashion regulations that advance our mandate under which we are to approve mergers only to the extent consistent with the public interest, and under which we are to promote a safe and sound rail system that runs smoothly and efficiently to provide service for rail customers in a manner that is consistent with the overall rail transportation policy established by Congress.<sup>4</sup> Not only would it be impracticable for us to try to act on a final round of mergers while we are in the process of developing new merger rules, it would also be disruptive to the rail system and to rail service that remains well below acceptable levels in many areas. The disruption would go far beyond the specific

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<sup>4</sup> The merger provisions of 49 U.S.C. 11324 direct the Board to consider the public interest in general and, in particular, the adequacy of transportation to the public; inclusion of other rail carriers in particular mergers; and financial, employee, and competitive issues. The rail transportation policy of 49 U.S.C. 10101, which guides us in our regulatory activities, directs us, among other things, to promote safety, efficiency, good working conditions, an economically sound and competitive rail transportation system, and the needs of the public and the national defense.

<sup>5</sup> We fully understand that our mandate is to protect competition, not particular competitors.

interests of BNSF and CN and the carriers that compete with them;<sup>5</sup> it could irreparably damage the entire industry, to the detriment of the interests of shippers, rail employees, and the national economy and defense.

Therefore, through this decision, we are announcing that, over the next 15 months, we will initiate and complete a proceeding that will provide new merger rules. To permit the development of the new rules, and to ensure that the industry has had the opportunity to fully recover from service problems associated with recent mergers without the distractions associated with consideration of additional mergers, we will maintain the status quo by ordering a suspension of all merger activity, categorized as major transactions, until after the final merger rules are issued, or a total period of 15 months.<sup>6</sup>

## BACKGROUND

As indicated, our hearing was triggered by the announcement that BNSF and CN seek to merge. This announcement came as the rail sector and the shipping public have been struggling to recover from the disruptions associated with the most recent round of mergers. Those consolidations regrettably have been accompanied by a number of serious service problems, and, while service levels have shown improvement in certain areas, overall, service is clearly not where it should be. Promised customer benefits have not yet been fully realized, and carrier relationships with customers, rail employees, and local communities have been strained. The performance of railroad stock market equities has been trending downward since the service problems developed in the East, taking a particularly sharp turn downward immediately after the BNSF/CN merger proposal was announced. If it continues, the downturn in the stock value, reflecting a loss of investor confidence, could threaten the capital investment that is needed by the rail industry to ensure that service improvements and growth can be sustained.

BNSF and CN have argued that their consolidation proposal should be examined on its own merits now, because it is a good one that will produce benefits for the shipping public. But regardless of the merits of the BNSF/CN proposal standing alone, many parties expressed concern that, if the BNSF/CN proceeding goes forward, that proposal will not go forward alone. Indeed, the Class I railroads have clearly stated that they would find it necessary to respond in kind, and there is a

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<sup>5</sup> We fully understand that our mandate is to protect competition, not particular competitors.

<sup>6</sup> In particular, within 20 days, we will issue an advance notice of proposed rulemaking (ANPR) suggesting areas in which new merger rules can be developed addressing the concerns that have been raised. (We are not in a position to propose specific rules at this time because, while several parties raised broad issues of concern, specific rule changes were not the focus of our hearing.) We will provide a total of approximately 60 days for comments and replies to the ANPR, and then, within an additional 120 days, we will issue a notice of proposed rulemaking (NPR). We will provide a total of 100 days for comments, replies, and rebuttal with respect to the NPR, and then, within an additional 150 days, we will issue final rules (a total of approximately 15 months from now).

substantial possibility that, absent decisive action on our part, in the very near future, we will likely be left with the prospect of only two large railroads serving North America. We at the Board, like members of the shipping public, are seriously concerned about the competitive consequences of this level of industry restructuring, and, in any event, about whether it would be in the public interest at this time, while the industry is still recovering from service difficulties and other disruptions associated with the last round of major rail consolidations. And so we held a hearing to help us address the important issues relating to major rail consolidations and the present and future structure of the North American railroad industry.

At the hearing, several significant themes kept recurring. We heard from Members of Congress, federal and state government agencies, shippers, and employees about poor service; the threat that another round of proposed mergers would further degrade service; and the need to let some time pass so that railroads, their employees, and their customers can catch their breath before the industry embarks upon what will likely be the final round of mergers. We heard from shippers and Members of Congress about the threat that another round of mergers would pose to competition in the industry, and we heard from a significant number of participants about the need for new rules to govern future mergers. We heard from Department of Transportation Secretary Rodney Slater that the BNSF/CN transaction should not be reviewed under a ~~A~~business as usual~~@~~ approach. And we heard from railroads and from members of the financial community about the financial instability of the industry, which could be further threatened by a new round of major mergers. We will discuss each of those issues.

## THE TESTIMONY

1. Service Instability. Rail mergers are pursued to increase efficiency and to improve service. At least at the beginning, however, service disruptions have accompanied the implementation of recent large mergers, and many shippers have experienced substantial adverse impacts in connection with the last round of mergers, beginning with the combination of the BN and SF systems, proceeding with the UP acquisition of the Southern Pacific (SP) system, and ending with the acquisition and division of Conrail by CSX and NS.<sup>7</sup> The overwhelming testimony at our hearing indicated that the shipping public has still not recovered from those disruptions. Shippers described the problems that they faced, and that many continue to face, as a result of their inability to obtain reliable service. Railroad chief executive officers (CEOs) involved in the last round of mergers testified how difficult merger implementation can be, even with the best planning and with the experiences of prior mergers to guide them. Small railroads testified that their ability to participate in the transportation business has been threatened by poor service. A senior rail equity research analyst whose firm is not representing any railroad in the newly initiated round of rail merger negotiations reported on a survey that he had conducted of large institutional investors that he advises. He testified that poor service is partially

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<sup>7</sup> We have also recently approved CN's application to control IC, but that transaction, which is largely end-to-end, has not yet been fully implemented.

responsible for the lack of investor confidence in the railroad industry, and that many investors do not want further mergers at this time, nor do they want the legislative changes (which they view as reregulation) that they fear further mergers will precipitate.<sup>8</sup> And the regular service performance reports provided by the railroad industry indicate that, while service is improving on some fronts, overall, it is still below where it needs to be.

That is why many of the shippers testifying C both large and small C asked us not to permit any further mergers at this time, and certainly not without a change in the way in which we evaluate mergers. Similar sentiments were expressed by Members of Congress, representatives of small railroads, and representatives of railroad employees.<sup>9</sup> Even the CEOs of the large eastern railroads stated that initiation of a new round of mergers would require them to focus on structural and management changes necessary to protect their own positions in the market, rather than on improving their below-par service. In short, in light of the service issues attending prior mergers and looming over future mergers, we heard widespread concern that any major consolidations at this time would not be in the national interest.

2. Competitive Issues. For several years, parties involved with the railroad industry have engaged in debate over competitive issues. Many shippers are of the view that prior consolidations have left large railroads with too much market power, and they seek various remedies to Alevel the playing field.@ In our hearing, there were repeated expressions C even from shippers with substantial market power, such as United Parcel Service and General Motors C of the view that the rail industry is becoming too concentrated.

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<sup>8</sup> Representatives of investment firms that are advising the applicants in the BNSF/CN proceeding (who also do not want what they describe as reregulation) pointed out that there is no way to know definitively what is driving rail stock prices downward, and that the drop in rail stock prices could simply be related to many of the same factors that are depressing the stocks of companies in other A old economy@industries. We do not doubt that the drop in rail stock prices is attributable to many sources, but it is clear that the current service disruptions and the announcement of the proposed BNSF/CN transaction have played a role. We believe that the potential for further disruption that would accompany the initiation of a final round of mergers at this time concern investors, who do not currently view railroad mergers as a positive because, overall, these mergers have not yet produced the good financial results that were promised.

<sup>9</sup> Clinton Miller, testifying on behalf of the United Transportation Union (the largest railroad union), alluded to both employee dislocations and service disruptions in support of his request for a hold on further mergers. Mark Filipovic of the International Association of Machinists expressed the view that recent mergers did not produce what was promised for railroads, shippers, or employees. Michael Wolly, representing three unions, requested a hold on further mergers until the issues associated with employee dislocations are resolved. And a number of the representatives of rail employees expressed concern about the fact that, under the BNSF/CN proposal, a major U.S. railroad would become foreign-controlled.



Various remedies were suggested to address this concern about concentration. Some shippers asked us to revisit the issues that we studied in-depth 2 years ago in our proceeding in Review of Rail Access and Competition Issues, STB Ex Parte No. 575. They would like us to change the rules in a variety of ways so as to promote more rail-to-rail competition throughout the industry. But short of a complete overhaul of the existing regulatory system (which the financial analysts and economists testifying at the hearing suggested could introduce an additional level of uncertainty and risk into the industry, thereby harming shippers by lowering aggregate rail investment below those levels necessary for railroads to maintain and improve service), a significant number of shippers stated that we need to adopt new merger rules to ensure that competition will not be curtailed further in the event that the industry seeks to merge itself into a duopoly.

3. New Merger Rules. Thus, for a variety of reasons **C** some related to service, some related to competition, and some, such as those expressed by Transportation Secretary Slater and representatives of rail employees, related to safety **C** there was substantial support at our hearing for a broad review of and revision to the rules governing major rail mergers. We agree.

Our existing merger policy guidelines were adopted by the Interstate Commerce Commission soon after passage of the Staggers Act of 1980. At that time, good government required a merger policy that, while recognizing the importance of competition, would encourage railroads to formulate proposals that would help rationalize excess capacity in the industry.

The goals of that merger policy have largely been achieved. It does not appear that there are significant public interest benefits to be realized from further downsizing or rationalizing of rail route systems, as there is little of that activity left to do. Looking forward, the key problem faced by railroads **C** how to improve profitability through enhancing the service provided to their customers **C** is linked to adding to insufficient infrastructure, not to eliminating excess capacity.

The testimony convinces us that our rules need to be reexamined. Given the current transportation environment, and with the prospect of a transportation system composed of as few as two transcontinental railroads, we may wish to revisit our approach to competitive issues such as the **A** one-lump theory<sup>®</sup> and the **A**three-to-two<sup>®</sup> question; downstream effects; the important role of smaller railroads in the rail network; service performance issues; how we should look at the types of benefits to be considered in the balancing test, and how we monitor benefits; how we should view alternatives to merger, such as alliances; employee issues such as **A**crashdown<sup>®</sup>; and the international trade and foreign control issues that would be raised by any CN or CP proposal to combine with any large U.S. railroad. As Transportation Secretary Slater pointed out, the sheer size of these potential new mergers poses unique risks and leaves no margin for error: if these mergers were to fail, or lead to service problems, the effects could be devastating for both the rail industry and the shippers that depend on rail service. We must be sure that our merger review process takes these risks into account.

## DISCUSSION AND CONCLUSIONS

Accordingly, we have concluded that we must revisit our merger rules, and that in the meantime we must maintain the status quo by directing large railroads to suspend merger activity pending the development of new rules. We understand those parties that argue that each case should be viewed on its own merits without regard to the prospect of future consolidation, but we cannot close our eyes to the fact that the mere consideration of any major merger now would likely generate responsive proposals that, if approved, could result in a North American duopoly.<sup>10</sup> Before proceeding down that path, we must make sure that we have the appropriate guidelines in place to assure that we can properly assess and fully protect the public interest in each individual case.

In their oral testimony, the CEOs of BNSF and CN recognized the argument that certain new requirements may need to be imposed on future merger proposals, but nevertheless urged us to proceed with consideration of their merger proposal now, developing any new requirements in the context of their application proceeding. We realize that administrative agencies can choose to develop new rules either by rulemaking or in individual adjudications, but in choosing which course to take, we consider what makes sense. Here, it simply makes no sense to attempt to develop new merger rules in the middle of what could likely be the final round of major railroad mergers.<sup>11</sup> New merger rules will be a major undertaking, and we will not know what the rules will look like until the process is over. Yet, under the BNSF/CN approach, we could be reviewing merger proposals involving at least four, and possibly all six, of the large North American railroads before we have had an opportunity to reexamine and reformulate our merger policy. The evidentiary filings in such cases are massive, and yet none of the parties would know what they would be expected to show until new rules are formulated. And then, at the end, once the rules are known, it is not only possible, but quite likely, that the merger process would have to start all over again. Thus, while BNSF and CN may see some benefit to themselves from such a procedure, the process would be inherently uncertain, could lead to substantial instability in the

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<sup>10</sup> The CEOs for BNSF and CN have stated that there is no reason why their merger should necessarily instigate any responsive action by any other railroad. But recent history shows otherwise; indeed, the UP takeover of the SP was a response to the BNSF merger. And CEOs of the other major railroads have stated that they would look to future mergers of their own as strategic responses to the BNSF/CN transaction. Indeed, Richard Davidson, CEO of UP, stated that his company strongly considered a merger with CP as a response to the recent CN takeover of the IC, but ultimately concluded that it would be better off focusing on issues other than mergers under the circumstances prevailing at that time. Given the size of the BNSF/CN transaction, we have no reason to doubt the assertions of the CEOs of the major railroads that if it goes forward, they would have no choice but to seek their own merger partners, and that in a short time, we could be faced with the prospect of a North American duopoly.

<sup>11</sup> We should note that the representatives of the Departments of Agriculture and Defense expressed the view that we should permit no major mergers at this time. Moreover, Transportation Secretary Slater urged us to make numerous and potentially complex changes to our merger rules that, if they are to be applied evenly to all future mergers, could not be practically effected in the middle of individual merger proceedings.

industry, and thus does not represent good government.

There are very serious risks associated with proceeding with individual merger proposals at this time, before we have new rules in place. The disruption that has beset the railroad industry in connection with the last round of mergers could reach unprecedented levels. Carriers whose management should be focused on fixing their service problems would instead be fixated on finding merger partners, defending their proposals, and responding in the regulatory arena to other carriers' proposals. Investors, who have forsaken the railroad industry in favor of businesses that they have come to believe may have more favorable future prospects, could devalue the industry further. And railroads could find it more difficult to finance the capital improvements necessary to provide the better service that is key to their financial revitalization. In short, the already fragile rail industry could be further destabilized.

We understand BNSF/CN's view that holding up their merger application proceeding would itself be viewed negatively by the financial markets as creating uncertainty. We disagree, as we do not see how anything could be more uncertain than moving forward without appropriate rules in place at the beginning to govern the proceeding, particularly at a time when uncertainty already surrounds the rail sector. Furthermore, investors have come to view rail mergers in a less than positive financial light, and we can see proceeding with the BNSF/CN proposal at this time as only adding to that negative environment. In this regard, we should note that there is clearly sentiment within the financial community **C** from those analysts who closely followed our hearing **C** that a delay in merger activity, while new rules are developed, would tend to reduce uncertainty for rail investors, help to stabilize rail financial

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<sup>12</sup> For example, a Credit Suisse First Boston Corporation rail stock analyst, in a March 6, 2000 note to investors, stated that our hearing might **A**provide some upside for the stocks if it appears that the risk of industry consolidation will be pushed further into the future by the Surface Transportation Board.<sup>@</sup> Another analyst, from ING Barings, in a March 14, 2000 note to investors, predicted that the Board would impose a merger moratorium, and that, as a result, **A**the industry is full of many buying opportunities,<sup>@</sup>including the shares of BNSF. A March 13, 2000 report by a J.P. Morgan analyst expressed the view that **A**rail stocks would react positively to<sup>@</sup>what the analyst believed was a likely **A** mid-term<sup>@</sup>(up to 2 years) hold on further mergers. A Donaldson, Lufkin, and Jenrette rail analyst, in a March 14, 2000 note to investors, explained that rampant pessimism has resulted in rail securities that **A** are selling at near recessionary levels. It is a reversal of some of this pressure that is exactly what we<sup>=</sup>d expect if we are allowed to gain some sense of the regulatory and structural outlook for the industry as a result of last week's STB hearings.<sup>@</sup> A Morgan Stanley Dean Witter stock analyst, in a March 8, 2000 note to investors, suggested that a decision by the Board to delay the merger process would remove some near-term uncertainty and lead to near-term strength in a number of railroad stock prices, including those of BNSF and CN. Finally, the Chairman and CEO of Wasserstein, Parella & Co., in a March 10, 2000 letter to Chairman Morgan, explained that his firm **A**feels strongly that allowing the proposed merger to proceed would place the entire industry in jeopardy,<sup>@</sup>since **A**the specter of another

markets, and provide an impetus for increasing rail share prices.<sup>12</sup>

Notwithstanding the serious potential public harms that could result from going forward, BNSF and CN argue that they will suffer if consideration of their merger proposal is delayed.<sup>13</sup> Unless they expect to escape the new rules that will apply to everyone else, however, and to hold other mergers at bay until their own is completed, we do not see how their transaction will not be adversely affected by the disruption that it would produce throughout the industry. BNSF and CN suggest that it is not fair to A penalize@them for the failures of others.<sup>14</sup> But our action here addresses industrywide concerns that involve all railroads (including BNSF and CN), and in any event, should not in any way be construed to be punitive.

Under 49 U.S.C. 11324, we must consider the public interest in addressing rail mergers, taking into account, at a minimum, adequacy of transportation to the public; including other rail carriers in the area involved; competitive effects; financial impacts on the involved carriers; and impacts on employees. In addition, the rail transportation policy set out in 49 U.S.C. 10101 directs us, among other things, to promote safety, efficiency, good working conditions, an economically sound and competitive rail transportation system, and the needs of the public and the national defense. For the reasons we have discussed, we believe that we can best advance all of these objectives by promptly initiating a rulemaking proceeding to adopt new rules, as appropriate, and providing a short period for parties to adjust to the new rules before proceeding with merger proposals. This approach should provide a degree of stability for what is now a very fragile industry and permit vital public interest issues to be addressed on an evenhanded basis for all merger proposals. To go forward with any individual merger proceeding in the meantime would be unfair to customers, carriers, employees, and affected

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round of rail mergers [at this time], which Wall Street is convinced this transaction will precipitate, will accelerate the flight of capital@from the industry. He concludes that the prospect of moving forward with the BN/CN transaction at this time Ais a serious threat to the industry's financial health, well being and long-term prospects.@

<sup>13</sup> BNSF and CN also argue that delay will defer the public benefits, such as new single-line service, associated with their merger. But there are various alternatives to merger that can approximate those benefits. Indeed, CN and its partner IC currently participate in an alliance with KCS, a smaller Class I carrier, that provides all parties many of the benefits of a merger. We note that both General Motors and United Parcel Service (two of the largest customers of CN and BNSF), which would presumably reap the largest benefit from the new single-line service these railroads promise, have testified in no uncertain terms that they do not want a merger to go forward at this time, as has KCS, whose CEO stated that the carrier would not survive as an independent carrier if the BNSF/CN proposal is implemented.

<sup>14</sup> We note that the BNSF merger, which was characterized by many, when it was initially proposed, as a manageable Aend-to-end@merger, had its own share of integration problems, and there was some testimony at the hearing concerning service issues on the CN/IC system, which has not yet been fully integrated.

communities, and would disrupt and distract the industry to the detriment of all of the public interest concerns that we are charged with advancing.

We recognize that our action here is unprecedented. But these are not ordinary circumstances, and we see no way of adequately protecting the public interest short of the steps we have outlined here. Congress has directed us to take such actions as are necessary to carry out our statutory mandate, 49 U.S.C. 721(a), and has expressly authorized us to take injunctive-type action to prevent irreparable harm, 49 U.S.C. 721(b)(4).<sup>15</sup> After considering all of the circumstances, as elucidated through our extensive hearings, we find that changes in our merger regulations are necessary now and that no major rail merger proposals should be filed, or will be considered, until new merger rules have been established.<sup>16</sup>

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Class I railroads are directed to suspend activity relating to any railroad transaction that would be categorized as a major transaction under 49 CFR 1180.2, pending development of new rules by the Board, as outlined in this decision. No filings relating to such a transaction will be accepted for 15 months.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.  
Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn commented with separate expressions.

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<sup>15</sup> The legislative history accompanying section 721(b)(4) explains that the provision Aexplicitly authorizes the [Board] to issue unilateral emergency injunctive orders to prevent irreparable harm. This power has been asserted and used by the [Interstate Commerce Commission] in the past, although not specifically granted by statute. The Committee intends to confirm the scope of the former ICC power in this regard. . . .@ H.R. Rep. No. 311, 104th Cong., 1st Sess. 124 (1995).

<sup>16</sup> Accordingly, for the reasons expressed herein, we hereby suspend the ANotice of Intent to File@ filed in Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company C Common Control, STB Finance Docket No. 33842, until such time as new merger rules have been promulgated and the period set forth in this Decision has expired.

Vernon A. Williams  
Secretary

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**Chairman Morgan, commenting:**

This decision has been one of the most difficult ones that I have had to make since becoming a member of the Surface Transportation Board and the Interstate Commerce Commission before it. The Board's action here directing the suspension of all rail merger activity for a period of time is particularly difficult for me because, as my record demonstrates, I do not believe that the government should intervene into free market processes without a very good reason for doing so. And I also believe that parties should get fair and expeditious consideration of matters brought to the Board. But the current problems facing the rail sector are so extraordinary that an unprecedented response is necessary. Given the financial and service instability that exists in the rail sector as a result of the most recent round of major railroad consolidations, I cannot in good conscience allow further actions to occur that I believe would run the risk of creating more disruption and instability to the clear permanent detriment of the Nation's transportation system, rail employees, rail customers, and communities across the country.

In this regard, once I decided that a time-out from mergers was necessary, I proposed a 2-year waiting period before merger applications could be filed. I firmly believe that a period of that length is necessary to accomplish all of the goals set forth in the Board's decision. A lesser time, in my opinion, will simply block the BNSF/CN proposal without fully achieving the immediate and lasting stability for which I am striving by taking this unprecedented action. Nevertheless, although a 2-year period would do more to allow a thorough reexamination of our merger rules and would permit the rail sector to adapt to those rules and achieve a firm level of stability before processing any more major rail consolidation proposals, overall our action here is clearly on the right track.

While certain interests have favored moving forward with the proposed BNSF/CN transaction when filed, many others have been opposed to moving forward with any further consolidation at this time, and certainly not until our merger rules are revisited. In balancing all of these concerns in determining what action would be in the greater public interest here, I have focused on the long-term, as well as short-term, effects of our actions, and on my concern about what would be for the greater good of all railroads, rail customers, rail employees and communities across the country. In view of the instability in the rail sector, the great risk of further harm from continued instability and disruption, and the need to promote the greater public good, it is my strong belief that processing mergers at this time and for a significant period thereafter would not be in the public interest.

**Vice Chairman Burkes, Commenting:**

This decision sets in motion a 15-month rulemaking proceeding to reevaluate the Board's merger guidelines and imposes a suspension on all major merger activity during this period. This upcoming proceeding will be extremely important. Much has changed in the railroad industry in the nearly twenty years since the majority of our current rules were established. I believe that it is long past

time to step back and revisit those standards.

The BNSF/CN merger announcement may have triggered this proceeding, but it is long since overdue. However, it is unfortunate that it was not held prior to their announcement. Consequently, in addition to substantive merger rules issues, the application and timing of a rulemaking proceeding have also become issues.

In this proceeding, we have established a 15-month period to develop new merger rules. Although this is almost double the period of time associated with the Board's last two major rulemaking proceedings (Ex Parte Nos. 627 and 628), the issues here are significant and complex and will require additional time. Although this proceeding could be completed in a much shorter time period, 15 months should be more than adequate for a thorough review of our merger rules.

Several parties have argued for a longer suspension period or moratorium, i.e., two or more years. I believe this would be much too long of a period of time. After we have issued our final merger rules, there would be a minimum of an additional year before any additional major railroad mergers could be approved. Moreover, the evidence indicates that railroad service has started to improve after the disruptions resulting from the past mergers and it is clear that those problems started long before the BNSF/CN announcement. In addition, a longer period could add to uncertainty for shippers who are considering building or relocating facilities or planning to enter into long term contracts.

In terms of application, I believe that the new railroad merger guidelines should apply to the proposed BNSF/CN merger and all future major railroad mergers. I also believe that, in fairness to BNSF and CN, and to all parties, it is important to resolve these issues in a timely manner.

#### **Commissioner Clyburn, Commenting:**

I stated in my opening remarks to Ex Parte 582 that this proceeding could be a defining moment concerning rail consolidation issues. Four full days of listening intently to comments from all sectors of the rail industry has only strengthened this belief. We have heard testimony from large railroads, small railroads, large and small shippers of all types of commodities, rail labor, economists, government agencies and Members of Congress. While diverse ideas regarding how the Board should address future consolidations emerged from the testimony, it was abundantly clear, however, that the time has come for a thorough review of the Board's current merger rules. Some did suggest that we proceed with future consolidation utilizing the same regulatory framework that currently exists, while some others have suggested that we ~~Atake a breath~~ and impose a moratorium on filing merger applications for two years, three years, or an indefinite period of time.

It is clear to me that the rail industry has changed dramatically within the past twenty years since the passage of the Staggers Rail Act of 1980. Rail consolidations have created a new paradigm in which we must now operate. Therefore, I support the Board's decision to institute the 15 month rulemaking process to revise our merger rules and suspend major merger transactions during this time. Others have called for longer periods of time to attempt to address uncertainties ~~C~~ real, perceived, or otherwise. However, my support of the 15 month suspension is based solely on what I believe to be an

appropriate time frame in which the Board Members and staff can address, appropriately, the plethora of complex issues the industry currently faces without unnecessarily suspending merger applications. I believe our approach is a reasonable one.